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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

ROBERT ANTHONY BOWDEN,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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DATED: JANUARY 16, 1984

QUESTION PRESENTED FOR REVIEW

WHETHER TRIAL JUDGE'S ACTIONS CONSISTING OF STOPPING DEFENDANT'S CROSS-EXAMINATION OF A CRUCIAL GOVERNMENT EXPERT WITNESS, INTERRUPTING EXAMINATIONS OF OTHER WITNESSES; AND DENYING DEFENSE COUNSEL ADEQUATE TIME TO REVIEW EVIDENCE THAT BY PREVIOUS AGREEMENT SHOULD HAVE BEEN MADE AVAILABLE TO DEFENSE COUNSEL FOR INSPECTION - ALL CULMINATED TO DEPRIVE DEFENDANT OF HIS - CONSTITUTIONAL RIGHTS OF EFFECTIVE CROSS-EXAMINATION, FAIR AND IMPARTIAL TRIAL, AND DUE PROCESS.

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OPINIONS BELOW

The opinion of the Court of Appeals was not published. The opinion, however, is reproduced in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1983. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTION AND STATUTORY
PROVISIONS INVOLVED

THE FIFTH AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES:

"No person shall be ... deprived
of life, liberty, or property,
without due process of law;"

THE SIXTH AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES:

"In all criminal prosecutions, the
accused shall enjoy ... an impartial
jury ... [cross-examination of] the
witnesses against him ... and to
have the assistance of counsel for
his defense."

STATEMENT OF THE CASE

On September 8, 1982, Robert Bowden
was indicted on four (4) criminal counts.
Each count alleged violation of 26 U.S.C.
Section 7201 for the 1978 calendar year.

In proving its case as to the
alleged tax evasion during the 1978 calendar
year, the government utilized the specific
items method.¹ This method entails an

¹The government relied on the cash
expenditure method of proof in its
unsuccessful attempt to show tax evasion for
the 1976, 1977 and 1979 calendar years.

examination of specific items, in this instance certain vendor checks made out to Defendant's business, Bowden's Welding Shop, that the government maintained were cashed yet left unreported in the books and records of Defendant's business.

To establish this evasion, the government called to the stand a tax expert, Charles Akerslout. Akerslout testified as to tax computations he personally had made concerning Defendant's tax returns. Defense counsel started a series of questions on cross-examination which effectively pointed out errors and discrepancies in Akerslout's computations in an effort to discredit Akerslout's testimony. The trial judge, however, intervened and stopped the cross-examination stating that the testimony was confusing the jury. Over objection of defense counsel, the trial judge called for a week-end recess for the stated purpose of allowing Akerslout to correct his computations. With his revised

computations, Akersloot returned on Monday and testified in a competent fashion, in contrast to the confusing, discrediting testimony of the previous Friday, and admitted that Defendant's income had been understated by an amount some Three Thousand Dollars (\$3,000.00) smaller than was charged in the indictment.

The Akersloot incident was not the only time the trial judge interfered with the examination of a witness. A government witness, William Beckham, was to testify concerning mutual debts between him and Defendant. On cross-examination defense counsel brought out that Beckham had not received cash from Defendant and had, in fact, been coerced by the IRS into signing a statement to the effect that he had received cash from Defendant. The trial judge intervened at this point with questions that took the form and effect of rehabilitating Beckham's testimony.

Throughout the trial both parties were under order to supply one another with any evidence that was to be presented at trial. Nonetheless, the trial judge allowed a 1968-1975 tax summary on Defendant, the preparation of which was unknown to defense counsel, into evidence in conjunction with Akersloot's testimony. Defense counsel objected arguing unfair surprise associated with the introduction of the tax summary in violation of the disclosure of evidence agreement between the parties. In response to Defendant's objection, the trial judge allowed defense counsel an inadequate amount of time to review the tax summary secretly prepared by the government.

REASONS FOR ALLOWING THE WRIT

In the instant case, actions by the trial judge have culminated to deprive Defendant of constitutional protections.

First, by halting defense counsel's cross-examination of tax expert Akersloot,

the trial judge denied Defendant the right of effective cross-examination of a government witness, a right which the Court has granted criminal defendants under the Sixth Amendment to the United States Constitution (confrontation of adverse witness clause). In the case of Alford v. United States, 282 U.S. 687 (1930), the United States Supreme Court reversed the conviction of the defendant because the trial court in an effort to protect the government witness from being discredited, had refused the defendant the right to elicit on cross-examination the witness' place of residence. The Court stated that "(i)t is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop." Id. at 692.

In the instant case, Defendant's purpose in cross-examining Akersloot was to discredit his testimony - testimony that was

crucial to the government's case against Defendant. Akersloot was the only witness that had reviewed the bookkeeping practices of Defendant's business, a review from which he based his opinion that various vendor checks had not been deposited. It is true that Defendant was not denied all right to cross-examine Akersloot. However, Defendant was denied effective cross-examination because he was prevented from cross-examining at the time that the discreditation of the witness would have been the most effective, that being right after the government had impressed the jury with Akersloot's credentials and his seemingly thorough knowledge of Defendant's actions on his tax returns. Such action runs counter to the Sixth Amendment's guarantee of a right to have effective cross-examination and thus Defendant maintains that the trial judge's intervention in this instance is reversible error for it violates the reasonable

latitude the trial judge must give counsel in conducting his cross-examination of a witness. See Alford 282 U.S. at 692. See also Davis v. Alaska, 415 U.S. 308 (1974); Smith v. Illinois, 390 U.S. 129 (1968).

Defendant also maintains that he was denied a fair and impartial trial due to the trial judge's conduct in interrupting examinations of witnesses and rehabilitating government witness. The trial judge not only stopped Defendant's cross-examination of Akersloot, but also interrupted the examination of William Beckham, a government witness. The questions presented to Beckham from the bench in essence rehabilitated the witness in the eyes of the jury. "The problems is that potential prejudice lurks behind every intrusion into a trial made by a presiding judge. The reason for this is that a trial judge's position before a jury is 'overpowering'. His position makes 'his slightest action of great weight with the jury'." United States v. Hickman, 592 F.2d

931, 933 (6th Cir. 1979) (citations omitted); see Quercia v. United States, 289 U.S. 466, 470 (1933).

The trial judge's intrusion in both the Beckham and Akersloot examinations was not warranted. The witnesses were not uncooperative; defense counsel was competently handling the questioning of the witnesses; finally, the issues presented particularly by Beckham were not complex and did not need clarification from the bench. Thus, by stopping the cross-examination of Akersloot and by rehabilitating the testimony of Beckham, the trial judge was not an impartial moderator, in fact he appeared very much the advocate of the government's position in this case. Defendant maintains that the end result of the trial judge's interference was the deprivation of his constitutionally guaranteed right to a fair and impartial trial.

Finally, Defendant asserts that the trial judge's failure to allow adequate time

to review documents not disclosed to defense counsel prior to trial resulted in a denial of due process and a denial of effective assistance of counsel because of the unfair surprise the introduction of the documents visited upon Defendant. The parties in this action had agreed to provide one another with all evidence that was to be introduced at trial. Relying on this agreement, Defendant had prepared his defense in light of the documents that were to be presented against him. The tax summary introduced into evidence, over defense counsel's objection, was not disclosed in accord with the agreement between the parties. Defense counsel requested time to review the tax summary. The request for time was not in the nature of delaying the trial, rather it was an honest request by defense counsel to review the surprise document in order to prepare a defense to it. The trial judge curtly denied defense counsel adequate time to examine the tax summary.

No established tests exist for deciding when a request for time, continuance, etc., is so arbitrary as to violate due process. The decision is inherently ad hoc. Ungar v. Sarafite, 376 U.S. 575 (1964). Given the agreement between the parties and the complete surprise with which the tax summary was introduced, Defendant maintains that he was subjected to unfair surprise. The denial of adequate time to review the tax summary effectively deprived him of due process under the law.

Also, the denial of adequate review time by the trial judge denied Defendant of effective assistance of counsel. "inadequate case preparation can jeopardize an accused's right to effective assistance of counsel." United States v. King, 664 F.2d 1171, 1173 (10th Cir. 1981) (quoting United States v. Morrison, 449 U.S. 361 (1981)). Furthermore, unreasonable time restraints imposed by the court can result

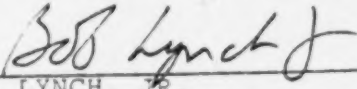
in the inadequate preparation, id., and have been held as reversible error on the part of the trial court. See Linton v. Perini, 656 F.2d 207 (6th Cir.), cert. denied 454 U.S. 1162 (1981); Intz v. Beto, 379 F.2d 937 (5th Cir. 1967); Barnes v. United States, 347 F.2d 925 (8th Cir. 1965). The instant case in which the trial judge allowed defense counsel only thirty minutes to review the lengthy, complex tax summary is such a case where the time restraint was unreasonable and thus effectively denied Defendant of his constitutional protection of effective assistance of counsel.

CONCLUSION

In the instant case, the trial judge was at many points in error. The cumulative effect of those errors was to deprive Defendant of due process, effective assistance of counsel, and right to cross-examine adverse witnesses. The prejudice the Petitioner has suffered is not harmless and reversal of the conviction is justified.

For the foregoing reasons, the Court should
issue a writ of certiorari and review the
ruling of the Court below.

Respectfully submitted,



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